Kmart Corporation *and* International Brotherhood of Teamsters Local 528, AFL–CIO. Cases 10–CA–27290–2 and 10–CA–27371

April 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

The issues presented in this case[1] are whether the judge correctly found that the Respondent: violated Section 8(a)(1) of the Act during the Union's organizational campaign by soliciting and promising to remedy employee grievances and by threatening plant closure, futility, and loss of benefits in the event of a union victory; and violated Section 8(a)(3) and (1) of the Act by disciplining and discharging employees Matthew Bailey Jr. and Timothy Clyde Johnson.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kmart Corporation, Newnan, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

''(a) Offer Matthew Bailey Jr. and Timothy Clyde Johnson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed, and make them whole, with interest, in the manner set forth in the remedy section of the judge's decision, for any loss of earnings and other benefits suffered as a result of the discrimination against them.''

''(b) Remove from its records any references to the notices of correction issued to Matthew Bailey Jr. on December 3, 1993, and February 15, 1994, and to the discharges of Bailey and Timothy Clyde Johnson, and notify both of them in writing that this has been done and that these incidents of discipline will not be used against them in any way.''

2. Substitute the following for paragraph 2(e).

''(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT institute a new policy of soliciting and promising to remedy employee grievances during an organizational campaign.

WE WILL NOT tell employees that we might close the plant if our operation costs go up if the employees select the International Brotherhood of Teamsters, Local 528, AFL–CIO, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT tell employees that they will never get a contract if they select the Union.

WE WILL NOT threaten employees that their participation in union activities might cause them to lose their benefits.

WE WILL NOT discourage membership in the International Brotherhood of Teamsters, Local 528, AFL–CIO, or any other labor organization, by discharging or disciplining employees because of their union activities

[1] On January 23, 1995, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's failure to consider R. Exh. 386, a summary of reports on employee Bailey's productivity, which was missing from the exhibit file reviewed by the judge. We have examined this exhibit and find no basis there for reversing the judge's conclusion that the Respondent's discipline of Bailey for low productivity violated Sec. 8(a)(3). We also note that there are no exceptions to the judge's finding that a notice of correction issued to Bailey on November 5, 1993, did not violate Sec. 8(a)(3).

[3] We shall modify certain provisions of the judge's recommended Order and notice to accord with the Board's standard remedial language.

or by otherwise discriminating against them with respect to their hire, tenure of employment, or terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Matthew Bailey Jr. and Timothy Clyde Johnson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL remove from our records any references to the unlawful notices of correction issued to Matthew Bailey Jr. on December 3, 1993, and February 15, 1994, and to the unlawful discharges of Bailey and Timothy Clyde Johnson and WE WILL notify them in writing that this has been done and that these incidents of discipline will not be used against them in any way.

KMART CORPORATION

Lesley A. Troope, Esq., for the General Counsel.
Robert O. Sands, Esq. and *Gregory J. Hare, Esq. (Ogletree, Deakins, Nash, & Stewart)*, of Atlanta, Georgia, for the Respondent.
Keith Maddox, of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge in Case 10–CA–27290–2 was filed on January 14, 1994, and the charge in Case 10–CA–27371[1] on February 18, 1994, by International Brotherhood of Teamsters Local 528, AFL–CIO (the Union). A consolidated complaint issued on June 17, 1994. It alleged that Kmart Corporation[2] (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) on September 9, 1993,[3] by soliciting and promising to remedy employee grievances for the purpose of causing the employees to reject the Union as their collective-bargaining representative. Respondent also violated the same section of the Act on October 15 by threatening its employees with plant closure if they joined the Union. It also violated the Act on December 1 by telling employees that they would never get a contract if they selected the Union; and on December 2 by threatening its employees with loss of benefits if they joined the Union or engaged in activities on its behalf.

The complaint also alleges that Respondent violated Section 8(a)(3) of the Act by issuing written warnings to Matthew Bailey Jr. (Bailey) on about November 19, December 3, and February 15, 1994, because of his union activities and by discharging Timothy Clyde Johnson (Johnson) on December 29, and Bailey on February 15, 1994, for the same reason.

A hearing was held before me on these matters on October 3–6, 1994, in Atlanta, Georgia. The General Counsel and the Respondent thereafter submitted briefs. On the basis of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

Respondent is a Michigan corporation, with an office and place of business in Newnan, Georgia, where it operates a distribution center. During the calendar year preceding issuance of the complaint, a representative period, Respondent received goods valued in excess of $500,000 from customers located outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES—THE ALLEGED VIOLATIONS OF SECTION 8(A)(1)

A. *The Union Campaign, the Board Hearing, and the Election*

The union campaign to organize Respondent's employees began in June or July. On September 8, the Union filed a petition to represent Respondent's warehouse and distribution employees, and a hearing was held on the petition on October 13 and 14. The election was held on December 21, and the Company prevailed by a vote of 329 to 201. Thereafter, the Union filed timely objections to the election which, as noted, were withdrawn during the hearing.

B. *The Alleged Solicitation of and Promises to Remedy Employee Grievances*

1. Summary of the evidence

Clinton White, the Company's general manager of its Newnan Distribution Center,[4] testified that he became aware of the union campaign in August. The Company's employee handbook states that it does not believe that union representation is in the best interest of the employees or the Company.[5] Bailey testified that White held several meetings with employees after the union campaign started. The first meeting at which Bailey was present was attended by 120 to 150 employees. White stated that the Teamsters were a truckdrivers' union, and that the Company did not need ''outsiders'' trying to run its business.

Thereafter, according to Bailey, further meetings of smaller numbers of employees were held. Bailey attended one

[1] Case 10–RC–14423 was originally consolidated for hearing with the unfair labor practice cases. The RC case involved the Union's objections to a Board election. The Union withdrew its objections at the hearing, and the General Counsel moved to sever the RC case from the unfair labor practice cases. I granted the motion.

[2] Respondent's name appears as stipulated at the hearing.

[3] All dates are in 1993 unless otherwise specified.

[4] The pleadings establish that White was an agent of the Company, and a supervisor within the meaning of the Act.

[5] G.C. Exh. 19.

such meeting in a conference room, at which Operations Manager Frank Krajovic spoke to employees.[6] He told them that the purpose of the meeting was to discuss problems and ways to solve them. Krajovic also asked employees to voice any concerns they had about their working environment. Bailey and another employee presented a list of 10 items, including management's attitude toward employees, and declining employee benefits.

About 2 or 3 weeks later, Assistant Manager of Repack Gene Johnson came onto the floor, and asked for volunteers to become part of a ''problem solving committee.'' Bailey volunteered, and a meeting of the committee was held by Krajovic. The meeting lasted for 5 hours. Krajovic presented a list of problems which had arisen in meetings ''we had been having.'' Bailey and other employees recommended that the Company hire its own temporary employees instead of using an employment service, so that it could raise the benefits of regular employees. They also recommended a ''middle man'' between the employees and management. Krajovic thanked the employees and said he hoped the Company had the solution to the problems. On cross-examination, Bailey testified that the Company routinely held departmental meetings on Fridays, at which it notified employees of changes that were going on, and also listened to any ''problems going on in the department.''

Krajovic did not appear at the hearing. General Manager White testified that Respondent had long had a ''steering committee'' of which employees were members, and that its purpose was to solve ''operational problems'' such as conveyors breaking down, the cutting of boxes, ''that type of issue.'' The objective of these meetings was to ''unload the cartons and get the merchandise to the stores.'' Asked whether Krajovic had solicited any additional employee concerns at the meeting he conducted, White asserted that he was not aware of any such solicitation, because he was not present at the meeting.[7]

2. Factual and legal conclusions

Respondent argues that its conduct was not unlawful because it was merely a continuation of an established practice of soliciting employee grievances. The Company asserts that the facts in this case are ''virtually identical'' to those in *Butler Shoes New York*, 263 NLRB 1031 (1982). In that case the employer's representative made a speech to employees reminding them of the employer's ''existing open door policy whereby the employees are encouraged to take up any problem that they may have relating to their employment with their supervisor.'' The Board concluded that this was not unlawful because the employer did not announce any new policy, and did not state that its policy would change (id. at 1063–1064).[8] Respondent also argues that there is no evidence of actual conduct for the purpose of encouraging employees to vote against the Union.[9]

The record does not support the factual premise of this argument. Although there is evidence that the Company had a practice of holding employee meetings, there is no evidence that they concerned the employees' working conditions or complaints. Rather, they concerned operational problems. Bailey testified that the meetings concerned ''problems going on in the department.'' General Manager White made it more specific—the meetings concerned operational problems such as equipment failures, and the objective was to get the merchandise out to the stores.

Respondent's new policy was evidenced by Bailey's uncontradicted testimony that Krajovic listed problems that had arisen in meetings with employees, and listened to suggestions on how to solve these problems. The suggestions included a change in the manner in which the Company utilized temporary employees, and even included a recommended ''middle man'' between the Company and its employees. There is no evidence that the Company had previously engaged in such discussions with its employees. I conclude that Respondent, during an organizational campaign, instituted a new policy of soliciting employee grievances concerning their working conditions.

It is well established that where an employer institutes a new policy of soliciting employee grievance during an organizational campaign, ''there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.'' *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). This principle has recently been reaffirmed by the Board in a case where, as here, the employer urged ''problem solving'' by his employees. *Embassy Suites Resort*, 309 NLRB 1313 (1992).

For these reasons, I conclude that Respondent, by the actions described above, violated Section 8(a)(1) of the Act.

C. *The Alleged Threat of Plant Closure*

1. Summary of the evidence

As set forth above, a Board hearing on the Union's representation petition was held on October 13 and 14. Bailey testified extensively on behalf of the Union during this hearing. On the following day, October 15, Bailey was questioned about his testimony by General Manager White and Personnel Manager Ken Brockman.[10] The discussion, started on the plant floor, became very heated and the parties went to one of the offices. Bailey was accompanied by employee Michael Payton, whose presence he had requested.

Payton testified that after the discussion of Bailey's testimony the Union was discussed, and the employees said that they wanted one in order to improve their benefits and working conditions.

Payton affirmed that Personnel Manager Brockman said that the warehouse was not making money, that it cost ''16 million'' to run it, and if this went up to ''25 million'' after the Union came in, that somebody would ''have to take a long hard look at its costing more to run it.'' Payton then asked whether that meant that the Company was going to ''close the warehouse down if the Union came in.'' Accord-

[6] The pleadings establish that Krajovic was an agent of Respondent and a supervisor.

[7] Bailey testified that White and other company officials were present at the meeting addressed by Krajovic.

[8] The Company also cites *Cafe La Salle*, 280 NLRB 379 (1986).

[9] R. Br. at 19. The Company cites *University of Richmond*, 274 NLRB 1204 (1985); *Mariposa Press*, 273 NLRB 528 (1984); and *Ace Hardware Corp.*, 271 NLRB 1174 (1984).

[10] The pleadings establish that Brockman was an agent of Respondent and a supervisor.

ing to Payton, Brockman's answer was: ''That it could—that somebody was going to take a long hard look at the figures if it cost us more.''

Bailey corroborated Payton. Thus, Brockman said that if the Company spends more money after the Union comes in, somebody would have ''think about it.'' Payton then asked: ''Are you saying that the Company is going to close down if we get a Union?'' Brockman's answer: ''Well, that's something that'll be thought about.''

Brockman testified that Payton asked whether the distribution center would close if the Union was selected by the employees. His answer, according to Brockman, was that a facility could not close because a union was voted in, but that it could close because of economic conditions. White testified that Brockman said, ''No, not that the Union would close the building, economic conditions could close the building.''

2. Factual and legal conclusions

Respondent argues: ''First, under all versions of the conversation, it is undisputed that Brockman did not state that the facility would be closed in the event of unionization. Indeed, there is no evidence that any of Respondent's agents ever raised the possibility of the facility closing.''[11]

The latter assertion is contrary to Brockman's and White's admissions that Brockman said the facility might close because of economic conditions. This is the only reasonable meaning of their versions of his answer. Accordingly, the only factual issue is whether Brockman acknowledged that plant closure might take place because of the Union, or whether he denied Payton's question and asserted that economic conditions might require closure.

The Company's witnesses do not deny that Brockman said the warehouse was not making money, and that if the cost of operating went up after the Union came in, somebody would have to take a ''hard look at it.'' They did not deny that Payton asked whether the Company would close the warehouse if the Union came in. The increased operating expenses hypothecated by Brockman were attributed to a union victory.

Payton was a current employee at the time of his testimony, a factor which adds credibility to his testimony.[12] Further, he was corroborated by Bailey. I credit their account of the conversation. In summary, a company agent told employees that if company expenses went up because of a union victory, the Company would have to think about closing the warehouse.

The Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969), has stated:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ''threat'' of reprisal or force or promise of benefit. He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization [authority cited]. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

In this case, Respondent linked the increased costs, which might cause it to close the plant, to a union victory. There are no ''objective facts'' in Brockman's statement on which a reasonable belief of economic necessity might be based—other than a union victory. This amounts to saying that a union victory might cause Respondent to close the plant. This statement was coercive, despite the fact that Brockman phrased his statement as a possibility. *NLRB v. Creative Food Design*, 852 F.2d 1295 (D.C. Cir. 1988), enfg. 283 NLRB 999 (1987).

Accordingly, I conclude that Respondent, by Brockman's statement described above, violated Section 8(a)(1) of the Act.

D. *The Alleged Threat that the Employees Would Never Get a Contract if They Selected the Union*

1. Summary of the evidence

Timothy Johnson, an alleged discriminatee, was a freight handler who loaded trucks for shipment to the stores. His supervisor was Danny Kitchens.[13] On or about December 1, Kitchens and Johnson engaged in a conversation. Johnson discussed the Company's use of a temporary service company for temporary employees. This was a subject the employees had discussed with management in the employee meetings, and Johnson had raised the issue. According to Johnson, Kitchens told him that the Company was not going to replace existing employees with temporary help. Johnson asked Kitchens to give him a writing to that effect, and Kitchens refused.

Conversation about the Union continued, and Kitchens said that if the Union came in, ''they're never going to get a contract.'' Kitchens had made a similar statement on other occasions, according to Johnson.

Johnson testified that ''the day after'' he and Kitchens had this discussion, General Manager White came to Johnson's worksite. He was angry, and handed Johnson a memo. ''I'm tired of everything that's coming off the floor. Now, here's what you said you would do.''[14]

[11] R. Br. at 7.

[12] *Soltech, Inc*., 306 NLRB 269, 271 (1992).

[13] The pleadings establish that Kitchens was an agent of Respondent and a supervisor.

[14] The memo, from White to Johnson, is dated December 2, and reads:

> It is my understanding that you have said that you will vote for the Company in the Union election if I assure you that you will not be replaced by a temporary.
>
> This memorandum will confirm that you have my assurance that you will not be replaced by a temporary.

Kitchens denied that he ever told Johnson that the Union would not get a contract if the employees selected it as their representative. However, Kitchens agreed that he discussed with Johnson the subject of another union's unsuccessful attempt to get a contract with one of the Company's plants in Lawrence, Kansas. Kitchens said, ''And I told him [Johnson] that it could very well happen in Georgia. That the same thing could happen in Georgia that did in Lawrence.''

2. Factual and legal conclusions

White's memo to Johnson corroborates that part of Johnson's testimony pertaining to temporary employees. Kitchens' version denies an outright statement of futility, but his admitted description of events in Lawrence where a union failed to get a contract and his admission that he told Johnson that the ''same thing could happen in Georgia'' come close to corroboration of Johnson's testimony. Accordingly, I credit Johnson's version of this conversation.

I conclude that by telling employees that they would never get a contract if they selected the Union Respondent thereby violated Section 8(a)(1). *Cannon Industries*, 291 NLRB 632, 637 (1988).

E. *The Alleged Threat that the Employees Would Lose Benefits if They Selected the Union*

1. Summary of the evidence

As set forth above, on December 2, General Manager White delivered to Timothy Johnson the memo quoted above. Johnson testified that the letter was a surprise to him, and that he wanted the ''guarantee'' (against replacement by temporaries) for all the employees.

Johnson sought and obtained an appointment with White in the latter's office on the afternoon of December 2. He told White that he was not going to change his vote, and that it was his right. They then discussed retirement benefits, and White said that he did not want the employees ''to lose everything they've already got.''[15]

Respondent cross-examined Johnson with the aid of an unsigned printed document which contains the date December 1 at the top. Johnson identified this document as having been printed by him in connection with an unemployment compensation hearing. The document relates events that assertedly took place on ''Dec. 1st & Dec. 2.'' The document appears to aver that the discussion with Kitchens and the later meeting with White in his office took place on December 2. It recites that, in White's office, Johnson told the general manager that he was in favor of the Union and had a right to support it.[16] Asked on cross-examination whether this document accurately described the meeting in White's office, Johnson replied: ''No, I don't think so. I give an affidavit for that, put all of the details in. This don't have all of the details.''

White admitted having a meeting with Johnson. He denied saying that he did not want the employees to lose ''everything they've already got,'' but added ''I would quote the Lawrence situation.''

2. Factual and legal conclusions

The printed date on White's memo to Johnson (December 2), and Johnson's testimony that he saw White the day after his discussion with Kitchens establish that these events took place on different days; the meeting with White was on December 2. The date of December 1 on the printed document is inconsistent with the date of the meeting with White. Further, Johnson affirmed that the document did not relate all that took place in White's office, and that this was contained in his affidavit—which is not in evidence. Finally, the assertion in the document that Johnson told White he favored the Union and had a right to do so is consistent with his testimony.

White obviously initiated a discourse with Johnson by his December 2 memo. His denial that he made the statement attributed to him by Johnson is weakened by his admission that he may have ''quoted the Lawrence situation''—where the employees failed to get a contract. White thus discussed employee benefits after unionization, and I credit Johnson's testimony that he said that he did not want the employees to lose everything that they had. This was an obvious reference to the employees' union activities, and constituted a threat that participation in such activities might cause them to lose their benefits. This statement was coercive and violative of Section 8(a)(1). *Intermedics, Inc.*, 262 NLRB 1407, 1415 (1982), enfd. 715 F.2d 1022, 1026 (5th Cir. 1983).

III. THE ALLEGED VIOLATIONS OF SECTION 8(A)(3)

A. *Applicable Principles*

The General Counsel has the burden of establishing a prima facie case that is sufficient to support the inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.[17]

B. *The Discharge of Timothy Clyde Johnson*

1. Summary of the evidence

a. *Johnson's employment history and union activities*

Johnson was employed as a freight handler in April 1988, and was discharged on December 29, 1993. Up until August 1992, he received five ''counselings'' for various infractions.[18] A ''counseling'' is not a formal disciplinary proce-

Despite my assurance that I am giving you, you should vote in the election based on what you feel will be in the best interest of you and your family. [G.C. Exh. 14.]

[15] Johnson preceded this quotation with the statement that White didn't specifically say that ''I' [Johnson] was going to lose everything,'' but then followed with the statement quoted above.

[16] R. Exh. 366.

[17] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[18] The infractions were skipping orders, a verbal confrontation with another employee, 5 percent of errors in selecting 341 items on one order, 2.2 percent of errors on picking 941 items on another order, and failure to follow procedures in checking repack orders. (R. Exhs. 52–56.)

dure. On the other hand, Johnson was commended with the following statement placed in his personnel file:

> Case Pack management wishes to express our appreciation for the continued outstanding performance of Clyde Johnson. Clyde's productivity, quality of work and attention to cleanliness are second to none. We want to thank Clyde for his efforts thus far and encourage him to continue the fine work. [G.C. Exh. 50.]

Johnson did not receive any formal discipline or suspension prior to his discharge.

Johnson engaged in handbilling on behalf of the Union, and wore union insignia and a T-shirt. On December 1 and 2, company supervisors made the unlawful statements to him outlined above.

b. *The banner incident*

An incident took place on December 20, the day before the election, and it is on this incident that Johnson's discharge was predicated. A chain link fence surrounded the plant, and a heavy vinyl banner saying ''Vote No'' was placed on it near the guard shack and fastened to the fence. The banner was about 6 by 8 feet in size, and was valued at $135. Placed over it was a ''Vote Yes'' poster the size of a bedsheet, which obscured the ''Vote No'' banner.

Union supporters were handbilling outside the fence. Prior to the 7 a.m. shift, Company Representatives Randy Addison and Gary McElroy noticed the ''Vote Yes'' sign and informed General Manager White, who instructed them to remove it. They did so, placed it in their vehicle, and departed.[19] This action revealed the ''Vote No'' banner.

Johnson was handbilling at the time. He testified that he approached the ''Vote No'' banner, and attempted to flip it over the fence so that it could not be seen. However, it was fastened to the fence at all four corners. Johnson testified that he accidentally caused a rip about 4 to 5 inches in it, and then desisted from attempting to flip it over the fence. The tear did not interfere with the legibility of the language on the banner.[20] Johnson was carrying a cutting tool which he used in his work.

Maintenance Manager McElroy testified that he observed this, and that Johnson grabbed the right side of the banner ''like he was trying to rip it off the fence.'' It slipped out of his hand, and he grasped it a second time and made the tear, about 12–14 inches in length. Addison denied that Johnson attempted to flip the banner over. He merely ''jerked'' on it and did not attempt to grasp it from the bottom.

Johnson testified that, at the time he touched the sign, he did not know that it was the Company's property. It may have been, Johnson surmised, the property of an employee ''Vote No'' committee. Later that morning, supervisors told him that the sign belonged to the Company.[21] Company managers testified that similar banners were hung up inside the plant, and that employees should thereby have known that the banner on the fence was a company banner. However, Safety Manager Addison testified that he did not know it was company property until December 20, when he informed General Manager White about the ''Vote Yes'' banner, and that White then told him that it was covering a company banner.

c. *The investigatory interview*

Later that morning, Johnson was called to a meeting attended by Company Managers Brockman, McElroy, and Kitchens. Johnson testified that Brockman asked him why he tore the sign. According to Johnson, he replied that he was trying to flip it over, and that tearing it was an accident. If he had wanted to, he could have torn it down.

Brockman testified that Johnson denied tearing the banner, and that he asserted that it was somebody else. Brockman executed a ''record of verbal discussion'' in which he recorded the foregoing as Johnson's position.[22] Brockman affirmed that, subsequent to his discharge, Johnson for the first time admitted at an unemployment compensation hearing that he had ripped the banner. McElroy and Kitchens corroborated Brockman.

d. *Johnson's discharge*

The election was held the following day, December 21, and, as indicated, the Company won the election. There was an intervening holiday, and the Union filed timely objections on December 28. General Manager White testified that he received legal advice to get a written statement from Johnson. On December 28, Johnson was called to the office of Personnel Manager Donna Carnes, and asked to give a written account of the incident. He refused, saying that he had already provided the Company with his version of the incident. The next day, Carnes discharged him. The separation report states that the reasons were ''gross misconduct and destruction of Company property.''[23]

2. Evidence of disparate discipline of other employees

a. *Doug McElroy*

Respondent's records show that employee Doug McElroy had an ''altercation'' with Safety Manager Addison in June 1994. McElory ''reacted by using abusive language and raised his arm in a quick motion.'' When he did so, a bulb he was carrying came out of his hand, and broke on the floor. The employee's position was that the damage was accidental. McElroy was issued a ''Notice of Correction.''[24]

b. *Danny Ogletree*

Respondent's records show that employee Danny Ogletree was involved in an incident in July 1994 ''that started out as horseplay and resulted in a fellow associate getting seriously injured.'' The Company's position was that horse playing, practical jokes, and ''picking an employee'' were inappropriate and ''could lead to immediate termination.'' The employee's position was that he felt bad at the way things

[19] One individual, apparently a union organizer, approached Addison as he was removing the union sign, and touched his arm. The exact details are not relevant.

[20] R. Exhs. 57–59.

[21] In a pretrial affidavit executed about 4 months later, Johnson refers to the banner as the ''Company's Vote No'' banner. (G.C. Exh. 22.)

[22] R. Exh. 60.

[23] G.C. Exh. 15.

[24] G.C. Exh. 35.

turned out. The Company issued Ogletree a ''Notice of Correction.''[25]

The Company took numerous statements from employees that show that the other employee was Tony Thompson, and that Ogletree touched or jabbed him in the side as he went by. Thompson called out to Ogletree that he had previously told him not to do this, and chased after Ogletree. As he did so, his head ran into a glass door and was cut, as were his arms.[26]

c. *Damage to company property*

There are numerous examples of damage to company equipment such as forklifts as the result of careless operation. The only results from these incidents were ''records of verbal discussion.''[27]

General Manager White could not name any employee other than Johnson who had been discharged for damaging company property between January 1992 and December 1993. In all such instances, the employee received either a verbal discussion or a notice of correction. The only employee discharged for ''gross misconduct'' was one who threatened employees with physical violence. White initially equated such conduct with Johnson's ''lying and blaming it (the banner incident) on someone else,'' but then agreed that Johnson was not disciplined for blaming the incident on someone else.

d. *Employee theft*

Company records show that employee Billy Fouts was discharged for ''misappropriation of Company property,'' i.e., theft.[28]

e. *The state unemployment compensation hearings*

There were two state unemployment compensation hearings in this matter. In the first one, in February 1994, both Johnson and Respondent participated and were represented by counsel. The administrative hearing officer found that Johnson ''tried to flip the sign over and when he did this the employer's sign tore.'' Contrary to the employer's contention, the hearing officer further found that Johnson had not violated any written policy. Nonetheless, the hearing officer concluded, Johnson ''deliberately defaced the employer's property in an effort to turn the sign over to cause it not to be visible.'' Accordingly, benefits were not awarded.[29]

The state agency later issued a notice to the parties that there had been a defective recording of the hearing, and ordered a new hearing and decision thereon.[30]

A second hearing was held before another hearing officer in April 1994. Johnson again appeared with a representative, but Respondent did not participate. The decision of the second hearing officer issued thereafter, and states in part that Johnson ''was discharged for gross misconduct and destruction of company property. The claimant did not understand the charge of misconduct but stated he accidentally tore a company sign. The claimant is not aware of a rule which he violated to cause immediate termination.'' The hearing officer further stated that the employer had the burden of proof that the employee was at fault by ''a deliberate, willing, and knowing action on his part.'' Finding that the employer had not met this burden, the hearing officer set aside the prior decision and ordered payment of benefits.[31]

3. Factual and legal conclusions

a. *The state agency decisions*

Respondent argues that the first state agency decision has more probative weight than the second, because ''after full hearing,'' the first hearing officer found that Johnson ''deliberately destroyed the Company's banner.''[32] This argument has no merit. The first decision is internally inconsistent. Respondent's decision not to participate in the second hearing was its own, and the decision in that hearing stands as the state agency's final action in the matter. It is well established, of course, that state unemployment compensation findings as to the reasons employees were discharged have probative value but are not controlling.[33]

b. *The banner incident and the investigatory interview*

There is no question that Johnson tore the banner. The only issue is whether he tore it deliberately or accidentally. For Johnson to have torn the sign intentionally would have been an act without purpose or meaning. The legend on the sign was not defaced, and the sign remained where it was with its message entirely visible. If Johnson had intended to remove the sign, he could have continued tearing it, or could have cut it off with the tool which he was carrying. As it was, the sign remained intact, with its message in place. The speculations of Respondent's witnesses about the position of the tear, and Johnson's arms, are not persuasive. He simply tried to pull a heavy vinyl banner over the fence, without success. My conclusion is consistent with the second unemployment compensation decision. On these facts Respondent could not have had a reasonable belief that Johnson intentionally damaged the banner.

I have carefully considered the contested evidence as to what took place during the investigatory interview on December 20. On the basis of the mutually corroborative and detailed nature of the testimony of Respondent's witnesses, I conclude that Johnson did not then admit that he had torn the banner, and, instead, attributed it to another employee.

Johnson was next asked, on December 28, to submit a written statement, and declined to do so. On the next day, he was discharged for gross misconduct and destruction of company property.

The company records and White's admission establish that no other employee was discharged as a result of the incidents described above: Nobody had ever been discharged for de-

[25] G.C. Exh. 38.

[26] G.C. Exhs. 60–66. Johnson testified to the same effect. Respondent objected to his testimony on the ground it was hearsay. I overrule the objection in light of the corroboration in Respondent's records.

[27] G.C. Exhs. 41–49.

[28] R. Exh. 403.

[29] R. Exh. 406.

[30] R. Exh. 407.

[31] G.C. Exh. 51.

[32] R. Br. 35, fn. 17.

[33] *NLRB v. Western Meat Packers*, 368 F.2d 65 (10th Cir. 1966); *Tennessee Packers, Inc*., 339 F.2d 203 (6th Cir. 1964); and *NLRB v. Pacific Intermountain Express Co*., 228 F.2d 170 (8th Cir. 1955).

struction of company property—despite evidence of damage to company equipment such as forklifts.

What was Johnson's ''gross misconduct?'' The term is not defined anywhere, and the separation report does not specify the nature of the alleged gross misconduct. At the hearing, White first attempted to liken Johnson's denial of responsibility for the banner to another employee who threatened physical violence. However, White admitted that Johnson's blaming another employee was not the reason he was discharged. In sum, there is no evidence of ''gross misconduct,'' whatever that is, and no other employee had been discharged for destruction of company property.

Respondent acknowledges that Johnson was a union supporter, that it knew this, and that Johnson voiced to management his concerns about being replaced by a temporary employee.[34]

The Company first cites various authorities which hold that an employer may discharge an employee for intentionally damaging company property. As I have concluded that Johnson's destruction of the banner was accidental rather than intentional, these authorities are inapposite.

The Company next argues that Johnson's ''alleged lack of intent is not really germane,'' since the Company could discharge him based on ''reasonable belief.'' Belief of what? Respondent cites *Overnite Transportation Co.*, 245 NLRB 423 (1979), and recites the judge's statement that the question was whether the employer reasonably believed that the employee committed the damage. Of course, in this case there is no question that Johnson damaged the sign—the issue is whether he did so intentionally. In *Overnight*, the judge recommended dismissal on the ground there was no proof of antiunion animus, and no evidence that the employee was a union protagonist. This case is inapposite.

Respondent also cites *Woodruff & Sons, Inc*., 265 NLRB 345 (1982), where the Board sustained an employer's discharge of an employee ''because of repeated costly damage to the truck he operated,'' and ''the opprobrious manner in which he pressed the complaint.'' The only damage in the case at bar was an accidental tear in a $135 vinyl banner, which remained legible. *Woodruff* is also inapposite.

Respondent's violations of Section 8(a)(1) establish its antiunion animus, and, as it has admitted, it knew that Johnson was a union protagonist. He had an excellent work record. Accordingly, the General Counsel has established a prima facie case that Johnson's union activities were a factor in his discharge. The Company has not sustained its burden of proof that he would have been discharged in any event. Accordingly, I conclude, by discharging him on December 29, the Company violated Section 8(a)(3) and (1) of the Act.

C. *The Alleged Discrimination Against Matthew Bailey Jr.*

1. Summary of the evidence

a. *Bailey's work history and union activities*

Bailey was hired in June 1989, and worked in the repack area, packing orders. His pay rate was at the highest scale for warehouse employees. Bailey joined the union campaign, solicited card signatures, passed cut fliers, and wore union insignia.

As indicated above, the Union filed its representation petition on September 8. Soon thereafter, Respondent abolished individual production goals for employees which it had maintained. As further set forth above, a hearing on the Union's petition was held on October 13 and 14. Bailey testified at the hearing on behalf of the Union for about 6 hours, longer than any other witness. At the unfair labor practice hearing, he affirmed that at the representation hearing he stated that he did not have to work as hard because of the abolition of production goals.

The day after the hearing, on October 15, General Manager White came to Bailey's work station, together with Supervisor Gene Johnson. White asserted that Bailey had stated at the hearing that he only had to work 2 hours a day. Bailey denied this, and was corroborated by employee Michael Payton. According to White, he simply wanted to know whether Bailey would work 8 hours a day for a full day's pay. Bailey's version was that these inquiries were tied to White's assertion as to what Bailey had stated at the hearing. The discussion became heated, and then moved to a front office.[35]

The dispute continued in the office, and Bailey suggested that they wait until the transcripts of the hearing were available. Some of the company managers recommended that Bailey be suspended. However, White did not do so. Bailey finally answered satisfactorily White's question about working 8 hours, and the discussion ended.[36]

b. *Bailey's November 5 notice of correction*

Respondent's rules call for a verbal discussion after three instances of tardiness within a calendar year, a written notice of correction after six such instances, and, ultimately, discharge for further tardiness.[37]

On November 5, Personnel Manager Donna Carnes called Bailey into her office. According to Bailey, she said that the Company had been looking over his file, and noted six instances of tardiness. Accordingly, Carnes issued Bailey a notice of correction listing the six infractions, the first on May 3 and the sixth on October 25. The notice states that Bailey had received a verbal discussion after the first three instances.[38]

Personnel Manager Carnes denied that she told Bailey she was reviewing his file. Carnes affirmed that Respondent has a clerical with the specific function of recording absences and tardies. Respondent introduced numerous copies of notices of correction of employees for tardiness before and after the union campaign.[39]

[34] R. Br. 39.

[35] The General Counsel's witnesses contended that White brought the group to the front office by an indirect route, thus ''parading'' them in front of other employees. Respondent's witnesses denied this.

[36] It was at the end of this discussion that Supervisor Brockman made the unlawful threat of plant closure discussed above.

[37] G.C. Exh. 7.

[38] G.C. Exh. 25.

[39] R. Exhs. 91–175.

c. *Bailey's December 3 notice of correction*

The Company maintained a store where employees could purchase, at a discount, items unfit for distribution. Bailey asked another employee who worked on a prior shift, Tommie Lee Hall, to purchase some mouthwash for him. Hall did so, paid for the mouthwash and obtained a receipt. She left the mouthwash and the receipt in a bag in the Company's lobby, with Bailey's name on it. A security guard noticed this and watched the bag for several hours.

At the end of Bailey's shift, he made some additional purchases at the store, and placed them in another larger bag. He then picked up the bag in the lobby, and placed it in the larger bag. Bailey testified that he did this because he had no other way to carry the smaller bag. There was a receipt for the mouthwash in the smaller bag.

Security Official Leno Blandenburg gives a description of what happened at the security desk. The security guard (Jerry) asked Bailey for a receipt, and Bailey gave him the receipt for the contents of the larger bag. The guard then asked whether Bailey had another bag, and Bailey replied affirmatively, saying that it was inside the larger bag. According to Blandenburg, Bailey ''took the (smaller) bag out.'' The guard asked where the receipt was, and Bailey replied that it was inside the smaller bag. At that point, Security Manager Addison said that they had to go to a private office. Bailey asked the reason, but complied with the request. Bailey's testimony is consistent with Blandenburg's.

Inside the office, Bailey found the receipt for the mouthwash, and showed it to Blandenburg. Bailey testified that he held it up in front of Blandenburg's face, so that the latter could read it. Blanderburg agreed that Bailey showed him the receipt. He asked Bailey to give it to him, so that he could make a copy. Addison, on the other hand, asserted that Bailey kept the receipt in his hand and that Addison did not see it. Addison contended that he first asked Bailey's permission to make a copy of the receipt, and then asked him to make a copy himself. Blandenburg, however, testified that he asked Bailey to give him the receipt. Bailey refused, said that he felt he was going to be charged with theft, and insisted on holding onto the only evidence of his innocence. Addison and Blandenburg denied that Bailey was ever under suspicion of theft.

Addison asked Bailey how he obtained the mouthwash. Bailey replied that Tommie Lee Hall purchased it for him. Addison stated that ''pre-purchasing'' was against company rules. Bailey replied that there was no such rule in the handbook, and Addison replied that it was common knowledge. Respondent introduced a document which pertains to this subject.[40] Addison agreed that there is nothing in the document prohibiting one employee from purchasing merchandise for an employee on a different shift. Blandenburg testified that prepurchases were common, and that Bailey's case was the first ''pre-purchasing'' matter he had ever been called upon to investigate.

Bailey then told Addison: ''Well, I have the receipt for it . . . I'll take it back there into the store and get my money back.'' Blandenburg said he could not do this.

Bailey had clocked out at 2:30 p.m., and it was by then after 3 p.m. He said he was ''off the clock,'' had a doctor's appointment and was going to leave. Addison said that this was insubordination. He also testified that no employee had been detained more than 10 minutes for an investigation. Bailey testified that Brockman agreed that it was not insubordination in these circumstances. Although Brockman stated that he did not give Bailey permission to leave, he did not deny Bailey's testimony.

Bailey asked the company managers: ''Well, what are you going to do about it?—it's my merchandise bought with my money.'' The company managers then left, apparently to discuss the matter, leaving Bailey with Blandenburg. Bailey told him: ''You guys have me in here to write me up for theft by stealing. I'm taking my merchandise and my receipt and I'm going.''

There is no evidence that the Company conducted any further investigation. It did not discipline Tommie Lee Hall. The following day, Respondent issued Bailey a notice of correction.[41]

d. *Bailey's February 15, 1994 notice of correction*

(1) Allegations in the notice of correction

Respondent issued a notice of correction to Bailey on February 15, 1994. It was this discipline, added to the prior notices of correction, which precipitated Bailey's discharge.

The notice of correction lists four alleged infractions: (1) excessive amount of time in the bathroom, from 15 to 30 minutes; (2) excessive talking with other employees on February 2, 3, and 4, 1994; (3) operation of a tram without authorization; and (4) low productivity for February 1, 2, and 4.[42]

(2) Alleged frequent use of the bathroom

Bailey had been a diabetic for about 10 years at the time of the hearing. A medical questionnaire which he filled out in 1989 lists that and other impairments.[43] Bailey testified that he had been hospitalized twice for diabetes, and that his file contained insurance forms documenting the insurance company's refusal to pay for it. The evidence includes a re-

[40] The document, which Addison asserted was implemented in April, states various purchasing hours for different shifts. Par. 4 reads: ''No merchandise can be pre-boxed or left in a holding area. All purchases must be paid for and taken out immediately.'' R. Exh. 28. Tommie Lee Hall apparently paid for the merchandise and took it out immediately.

[41] The notice of correction reads:

> Mr. Bailey attempted to leave the D.C. (Distribution Center) without displaying for inspection a receipt for merchandise purchased at the Company store by hiding one bag of merchandise inside another large bag. When confronted and questioned, Mr. Bailey admitted that the hidden bag of merchandise had been purchased prior to the conclusion of his shift in violation of D.C. policy. Mr. Bailey also hindered the ability of management to complete their investigation of this incident by leaving the D.C. with the receipt for the hidden bag of merchandise without permitting management to copy it as requested. Mr. Bailey's conduct demonstrated a complete lack of cooperation with management and could be viewed as insubordinaton. Mr. Bailey is placed on notice that any further similar acts on his part will not be tolerated and may result in immediate dismissal.

Bailey's written comment was: ''This is very unfair.'' (G.C. Exh. 24.)

[42] G.C. Exh. 26.

[43] R. Exh. 371.

quest for a payroll adjustment on behalf of Bailey, signed by General Manager White in June 1992, with the notations ''Diabetes, 6/23/92–7/1/92.''[44] White testified that this authorized Bailey to take medical leave for the indicated period.

Bailey testified that his diabetic condition required him to urinate frequently. He further testified that the frequency of his bathroom visits did not vary before and after the union campaign and election.

Bailey was given a ''verbal discussion'' on January 7, 1994, by Supervisor Fuller for making trips to the bathroom too frequently.[45] Bailey testified that he told Fuller he was a diabetic, and that these trips were the result of the medical condition. According to Bailey, Fuller told him that he had talked to Personnel Manager Brockman about the matter, and that the company nurse had also talked to Brockman. Accordingly, the matter was ''understood.'' Fuller testified that no more verbal discussions were issued to Bailey for this reason, and that this had been the first one.

Personnel Manager Brockman, on the other hand, contended that Bailey protested the verbal discussion and that Brockman examined the file. Although there was a reference to Bailey's diabetic condition, there was no reference to continuing symptomatology. Brockman said he told Bailey he needed another doctor's report. Bailey testified that there was a delay in his seeing his doctor because the latter's wife had passed away. Bailey obtained a new report on February 9, but was fired before he could submit it.

The February 15, 1994 notice of correction states that Bailey made an excessive number of visits to the bathroom, and that their time span was 15 to 30 minutes.[46] Bailey denied this, and testified that he spent this amount of time on only one occasion.

Respondent argues that Bailey's bathroom visits were coordinated with the visits of other employees.[47] Group Leader Lonnie Hill testified that Bailey and three other employees appeared to be ''wandering off to the bathroom together more than once.'' Hill further testified that the repack area, where the employees worked, comprised one-ninth of 47 acres of the plant,[48] in 4 ''modules'' on two different floors. Hill did not know of any way by which the employees could have communicated with one another to arrange coordinated bathroom visits. He further agreed that one of the four employees alleged to have wandered off to the bathroom together was a female.

(3) Excessive talking

As noted, the February 15 notice of correction cites Bailey's alleged excessive talking on February 2, 3, and 4, 1994. On February 4, Department Manager Fuller issued a report of a verbal discussion with Bailey, citing reports from other employees that Bailey was away from his job and ''talking'' for 18 minutes. The name of the other employee and the date of the ''talking'' are not stated. Bailey's recorded response was a question to Fuller whether the employee he was talking to would also receive a verbal discussion, and the asserted answer was affirmative. Bailey also claimed that he was being ''watched'' by management and some other employees.[49]

On the same day, Fuller issued another record of verbal discussion, although it is unclear whether this was the same or a different one for the same day. In this memo, Fuller asserts that some employees complained to him about Bailey's talking and alleged interference with work. Neither the names of the employees nor the dates are stated.[50]

As to the first verbal discussion, Bailey testified that Fuller told him he had wasted 18 minutes by talking to Sandra Odum for 7 minutes before his break, and to Lendell Spears for 3 minutes, plus another 8 minutes when Fuller did not know where he was. Bailey testified that employees picked up their orders from Sandra Odum, and discussed problems with her, while Spears' responsibility was to fill in merchandise slots on the shelves. Bailey affirmed that it was necessary to talk with these employees in the performance of his job. The foregoing is the only verbal discussion listed in the notice of correction pertaining to excessive talking on the listed dates.

On January 4, 1994, Department Manager Fuller gave Bailey a verbal discussion for talking with James Gordon on December 29, 1993, and January 3, 1994. As to the former date, the memo alleges that while Bailey was on break, Gordon was not.[51] Bailey testified that he was on a break. Fuller testified that he did not know which employee initiated the conversation and did not know of any discipline administered to Gordon.

On January 24, 1994, Fuller had a verbal discussion with Bailey on the ground that employee Joe Bowen had complained that the employees could have had ''a code,'' i.e., could have gone home early, if Bailey ''had cut out some of his talking.''[52]

Bowen testified at length about Bailey. He asserted that Bailey talked a lot, sang while working, and quoted the scriptures. Other employees ''wouldn't actually gather around him,'' but would ''stop to listen, but not for too long.'' Bowen asserted that he himself was able to pick items for his orders from the shelves and simultaneously observe Bailey. Bowen contended that Bailey was away from his work station frequently, from 20 to 30 minutes at a time.[53] Bowen wore a ''Vote-No'' T-shirt and hat during the union campaign.

Bailey had not received any discipline for talking prior to the union election on December 21, 1993.

(4) Alleged unauthorized use of a tram

Respondent's practice was to transport employees from work areas to break areas by means of a tram pulled by forklifts. The latter were customarily operated by employees. Authorization to do so is set forth in a company handbook as follows:

> The rules below apply to all powered vehicles unless otherwise stated.

[44] G.C. Exh. 28.
[45] R. Exh. 33.
[46] G.C. Exh. 26.
[47] R. Br. 66.
[48] Other estimates list 52 acres.
[49] R. Exh. 43.
[50] R. Exh. 44.
[51] R. Exh. 32.
[52] R. Exh. 36.
[53] R. Exh. 37.

1. Only trained and licensed operators per authorization by the DC Loss and Prevention and Safety Manager will operate motive equipment.[54]

The handbook further provides that ''only trained and authorized personnel are permitted to operate such vehicles.''[55]

Department Manager Fuller testified that Bailey was authorized and licensed by the loss prevention & safety manager to operate the forklift in question. However, Fuller argued, an employee must also get departmental permission to operate a powered vehicle. Fuller agreed that this is not stated in Respondent's written rules.

On February 4, 1994, Cassandra Mitchell was driving the tram. She recently had foot surgery, and told fellow employees that it hurt her foot to operate the forklift. Bailey, Arthur Hussie, and Kenneth Bailey drove the tram for her.

Mitchell, Hussie, and Kenneth Bailey received verbal discussions for unauthorized use of equipment.[56] The record of these discussions states that, in addition to being trained and licensed, the employee needed permission of his supervisor. Hussie and Kenneth Bailey are quoted in the reports as saying that they had no knowledge of this requirement.[57] Respondent introduced a record of another, similar verbal discussion after the events litigated herein. That employee also said he did not know that he needed departmental permission.[58]

Fuller contended that Matthew Bailey also received a verbal notice. Asked why this alleged infraction was included in the February 15 notice of correction, Fuller replied that it was a ''compiled situation that just kept growing.'' Fuller admitted that Bailey had previously operated the forklift without permission. Fuller did not discipline him on this occasion, he said, because Bailey was transporting Christmas presents.

(5) Alleged low productivity

As indicated, Respondent had abolished individual production standards in 1993. Nonetheless, according to Respondent's witnesses, employees were still evaluated to see which were working to the best of their ability. Department Manager Fuller testified that, because of Bailey's alleged wasting time, he decided to check Bailey's production compared to that of about seven other employees. There were about 15 employees in module 11, where Bailey worked, and about 50 in the repack department. Fuller agreed that Bailey sometimes worked in other modules.

Fuller concluded that Bailey had the lowest production of those he examined. He reported his findings to Personnel Manager Brockman, who conducted a more extensive investigation of 45 to 50 order pickers. Brockman concluded that Bailey's productivity was below the average.[59]

Brockman did not respond to a question as to Bailey's ranking among the 45 to 50 order fillers, and conceded that it was possible that there were others with lower productivity records. Respondent's rationale for disciplining Bailey is that the Company did not receive reports about other employees ''wasting time, engaging in excessive conversation, and making excessive trips to the bathroom.''[60]

Department Manager Fuller testified that Bailey did not receive any verbal warnings for low production. Bailey was not shown his statistics as compared to others. Group Leader Lonnie Hill did not know of any employee (other than Bailey) who had been disciplined for low production since the abolition of individual production goals in mid-1993.

(6) Bailey's termination

Respondent discharged Bailey on February 15, 1994, because he had received three notices of correction within a 12-month period. Such discipline was set forth in Respondent's handbook.[61]

2. Factual and legal conclusions

(a) *The November 5 notice of correction—tardiness*

As noted, Bailey affirmed and Donna Carnes denied that she told Bailey she had been reviewing his file. The General Counsel argues that Respondent has not provided any reason for a review of the file, that there were no more evaluations of employees, and that the timing of the notice of correction—soon after Bailey's testimony at the representation hearing—establishes Respondent's discriminatory motivation.[62]

Assuming arguendo that Bailey rather than Carnes is credited, the issue is whether the Company would nonetheless have issued a notice of correction to Bailey for tardiness at this time. Carnes' testimony that the Company has a clerical who routinely examines tardiness records is unrebutted, while the Company has submitted documentary evidence of similar discipline to other employees for the same offense.

I conclude that the Company's violations of Section 8(a)(1) and Bailey's prominence in the union campaign establish the General Counsel's prima facie case. However, Respondent's evidence shows that it would have taken the same action even in the absence of Bailey's union activities. Accordingly, I shall recommend that this allegation be dismissed.

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[54] G.C. Exh. 30.

[55] G.C. Exh. 36.

[56] R. Exhs. 39–41.

[57] R. Exhs. 40, 41.

[58] R. Exh. 348.

[59] Respondent submitted voluminous data of the ''picks'' of other order fillers. (R. Exhs. 78–89 and a ''Summary'' thereof (R. Exh. 386) which, according to Respondent, showed that Bailey's ''average'' was considerably below the average, or ''arithmetic mean.'') Respondent argues that the summary shows that Bailey's production was far below average. R. Br. 74. The problem is that the summary, R. Exh. 386, which I received over the General Counsel's objection, is not in the exhibit file. I do not consider this absence to be significant, because the underlying data was admitted, and because of the other factors affecting this issue.

[60] R. Br. 74.

[61] R. Exh. 72, p. 10. Respondent issued a record of verbal discussion to Bailey on December 3, 1993, for using ''obscene and abusive'' language toward a security guard who was checking in a truck when Bailey was trying to exit the gate. R. Ex. 19. Bailey denied using profanity, and testified that it was the guard who had done so. I consider it unnecessary to make credibility resolutions on this issue, because this incident was not alleged in the complaint nor cited by Respondent as a reason for Bailey's termination.

[62] G.C. Br. 22–23.

(b) *The December 3 notice of correction—the pre-purchased mouthwash*

The Company had a legitimate right to deter employee theft, although Security Manager Addison denied that Bailey was under suspicion of theft. The Company's actions in this instance went beyond any legitimate concerns. For several hours, a guard watched a bag in the lobby with Bailey's name on it, without investigation. According to Respondent's witness Blandenburg, when Bailey talked with the security guard, he took the smaller bag out of the larger bag and said that the receipt was inside it. Instead of allowing Bailey to produce it, Security Manager Addison insisted that they go to a private office. Although Bailey asked the reason, he complied with this request. The allegation in the notice of correction that Bailey attempted to leave without displaying the receipt is false.

Inside the office, Bailey took the mouthwash receipt out of the bag, and allowed Blandenburg to read it. Once this took place, the Company knew that the mouthwash had been purchased. Its demand that Bailey release the receipt to the Company for copying purposes—as stated by Bailey and corroborated by Blandenburg—was unjustified. The Company knew that the mouthwash had been purchased. Bailey's fear that he was being set up for a charge of theft, and his reluctance to release the receipt were not unreasonable.

The evidence is insufficient to establish that the Company had any rule prohibiting one employee from purchasing items for another employee on a different shift. Yet the notice of correction falsely asserts that this was a violation of company policy.

Since there was no issue of theft, and no company rule being violated, what was the need for further investigation? Indeed, there was none, and Tommie Lee Hall, who purchased the mouthwash was not disciplined.

The notice of correction states that Bailey's conduct could be ''viewed'' as insubordination. There is no merit to this accusation. Bailey had given the Company all the information it needed. No employee had previously been detained more than 10 minutes. Bailey's shift had ended over 30 minutes before the events in the office.

I conclude that this incident amounts to company harassment of Bailey because of his union activities. Accordingly, the discipline was violative of Section 8(a)(3) and (1).

(c) *The February 15 notice of correction*

(1) Bailey's visits to the bathroom

It is undisputed that Bailey had diabetes, and that the Company knew it and had authorized medical leave for this purpose. I credit Bailey's uncontradicted testimony that this condition required him to visit the bathroom more than would have been customary, and that the frequency of his visits did not change before and after the union campaign and election.

Personnel Manager Brockman claimed that the file did not reflect Bailey's need for frequent bathroom visits. If so, there is no explanation for the Company's toleration of Bailey's trips to the bathroom before the union campaign. Further, Bailey testified that Supervisor Fuller told him that Brockman had talked with the nurse, and that the matter was understood. I credit Bailey's testimony. An inference that the Company accepted Bailey's continuing symptomatology is warranted based on the fact that Fuller issued no further verbal discussions about the matter between January 7, and February 15, 1994—when, presumably, Bailey continued to use the bathroom with the same frequency.

Lonnie Hill's testimony about coordinated visits to the bathroom is in part improbable—there was no way the employees could have communicated with one another—and in part absurd.

Despite the fact that Bailey had a medical condition which created symptoms of which the Company had knowledge and had tolerated, the notice of correction lists the frequency of the bathroom visits as evidence of poor performance. I conclude that the real reason for this listing was Bailey's union activities.

(2) Excessive talking

The only charge for excessive talking on one of the dates cited in the notice was Bailey's alleged wasting 18 minutes on February 4, 1994—in part for talking with Sandra Odom and Lendell Spears. Bailey's description of their duties and the necessity for order pickers to talk with them is unrebutted and credited.

Bailey's talking with James Gordon on January 4, 1994, is not listed in the notice of correction. It is undisputed that Bailey was then on a break. Although Supervisor Fuller stated that Gordon was not on a break, he did not know who initiated the conversation, nor of any discipline administered to Gordon.

Joe Bowen's testimony is not persuasive. Although he initially contended that other employees listened to Bailey singing and quoting the scriptures, he tempered this by adding that it was ''not too long.'' Bowen's testimony that he could pick orders accurately and simultaneously watch Bailey is implausible. His assertion that Bailey was frequently away from his work station for 20 to 30 minutes is not supported by any credible evidence. I consider Bowen to have been a biased witness.

There is no evidence that Bailey's talking at work was any different after the union campaign and election that it was before that time. He had not previously received any discipline for this reason. And yet, after the campaign and election, the Company started issuing memos on this subject to him. They were unwarranted in the case of the conversations with Odom and Spears, and unlisted in the conversation with Gordon—plus the fact that Gordon received no discipline for the same conversation.

For these reasons, I conclude that the ''excessive talking'' citation in the notice of correction was discriminatorily motivated.

(3) Bailey's driving the tram

It is undisputed that Bailey had a license to drive powered vehicles from the Company's loss prevention and safety manager, as required by the Company's rules. It is also undisputed that he and two other employees drove the tram for an employee who had undergone foot surgery. These employees did not get departmental approval to drive the tram on that day, and the only factual issue is whether there was a company rule requiring them to do so.

The Company was unable to point to any clearcut documentary evidence of such a rule. Although it issued verbal

memos to the other two employees who helped Cassandra Mitchell, both stated that they had no knowledge of any such rule. Seeking to buttress its position, the Company introduced a similar discipline of another employee—yet he also professed lack of knowledge that there was a rule requiring department permission before operating the tram. Supervisor Fuller had previously seen Bailey driving the tram without departmental permission, but did not give him a verbal discussion.

I conclude that either that there was no such rule, or that it was not enforced.

The other employees received verbal discussions for this alleged infraction. However, in Bailey's case, it was listed on a notice of correction which led to his termination. I conclude that this listing was discriminatorily motivated.

(4) The alleged low productivity

Company Managers Fuller and Brockman engaged in exhaustive analysis of company records in order to compare Bailey's production to that of other order pickers. They concluded that he was below average. Personnel Manager Brockman did not know Bailey's ranking among the 45 to 50 order pickers, and conceded that other employees may have had lower productivity. Bailey was not given any warning about his productivity. He was not allowed to compare his productivity with that of other employees, nor to rebut the Company's charge. It simply appeared in the notice of correction.

The Company concedes that it did not pay attention to other employees who may have had productivity records lower than Bailey's. The Company's reason for this disparate treatment—that the other employees did not commit the same infractions as did Bailey—is not supported by examination of those alleged infractions as set forth above. No other employees received a warning for low productivity, and Bailey's discipline for this reason was the only one issued by the Company since it abolished individual production goals in mid-1993.

I conclude that this discipline was discriminatorily motivated.

(d) *Summary of the February 15 notice of correction, the other notices, and Bailey's discharge*

With the exception of the notice of correction for tardiness, none of the other notices was supported by credible evidence. Accordingly, the December 2, 1993 and February 15, 1994 notices of correction were violative of Section 8(a)(3) and (1). Bailey therefore did not have three justifiable notices of correction within a 12-month period, and termination for this reason was not warranted. Indeed, the entirety of the evidence shows that after the union campaign and election, Respondent engaged in numerous efforts to fabricate evidence against Bailey, the leading union supporter. I conclude that his discharge on February 15, 1994, was also violative of Section 8(a)(3) and (1).

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Kmart Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters Local 528, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Instituting a new policy of soliciting employee grievances and promising to remedy them during an organizational campaign.

(b) Telling its employees that Respondent might close the plant if operating costs went up after the employees selected the above-named Union as their bargaining representative.

(c) Telling employees that they would never get a contract if they selected the above-named Union as their bargaining representative.

(d) Threatening employees that their participation in union activities might cause them to lose their benefits.

4. Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Discharging Timothy Clyde Johnson on December 29, 1993, because of his union activities.

(b) Issuing a notice of correction to Matthew Bailey Jr., on December 3, 1993, concerning certain alleged transgressions with respect to Bailey's purchase of a company product, where the real reason was Bailey's participation in union activities.

(c) Issuing a notice of correction to Bailey on February 15, 1994, for alleged excessive amount of time spent in the bathroom, excessive talking, operation of a tram with authorization, and low productivity, where the real reason was Bailey's participation in union activities.

(d) Discharging Bailey on February 15, 1994, assertedly for having three notices of correction within a 12-month period, where two of the notices were themselves unlawful, and where the reason for Bailey's discharge was his union activity.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as here specified.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully issued notices of correction to employee Matthew Bailey Jr., on December 3, 1993, and February 15, 1994, and discharged him on February 15, 1994; and unlawfully discharged employee Timothy Clyde Johnson on December 29, 1993, it is recommended that Respondent be ordered to offer them reinstatement to their former positions, without prejudice to their seniority or other rights and privileges, or, if any such position does not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill the position, and to make them whole for any loss of earnings they may have suffered by reason of Respondent's unlawful conduct by paying each of them a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner estab-

lished by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[63]

I shall also recommend that Respondent be ordered to expunge from its records all references to the unlawful notices of correction which it issued to Matthew Bailey Jr., and notify him in writing that this has been done, and that Respondent will not rely on either of the notices as a basis for future discipline of him.

I shall also recommend the posting of notices.

On these findings of fact and conclusions of law and on the entire record, I recommend the following[64]

ORDER

The Respondent, Kmart Corporation, Newnan, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instituting a new policy of soliciting employee grievances and promising to remedy them during an organizational campaign.

(b) Telling employees that Respondent might close the plant if operating costs went up after the employees selected the Union as their bargaining representative.

(c) Telling employees that they would never get a contract if they selected the Union as their bargaining representative.

(d) Threatening employees that participation in union activities might cause them to lose their benefits.

(e) Discouraging membership in International Brotherhood of Teamsters Local 528, AFL–CIO, or any other labor organization by discharging or otherwise disciplining employees because of their union activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Timothy Clyde Johnson and Matthew Bailey Jr. reinstatement to their former positions or, if any such positions no longer exist, to substantially equivalent positions, dismissing if necessary any employee hired to fill that position, and make each of them whole for any loss of earnings either may have suffered by reason of Respondent's unlawful discharges of them, in the manner described in the remedy section of this decision.

(b) Expunge from its records all references to its notices of correction issued to Matthew Bailey Jr. on December 3, 1993, and February 15, 1994, and notify Bailey in writing that this has been done and that Respondent will not rely on either notice as a basis for future discipline of him.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility at Newnan, Georgia, copies of the attached notice marked ''Appendix.''[65] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[63] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp*., 281 NLRB 651 (1977).

[64] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[65] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''